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### Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student

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## NOTES

# RETURN TO SENDER: OFF-CAMPUS STUDENT SPEECH BROUGHT ON-CAMPUS BY ANOTHER STUDENT

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### INTRODUCTION

The right to speak one's mind and express one's ideas is an essential component of American society. This right is secured and protected by the First Amendment of the United States Constitution.<sup>1</sup> Each year a high number of alleged First Amendment violations come before the courts.<sup>2</sup> These present particularly difficult legal questions because courts must consider the speech's impact on impressionable youth. It is not startling that many courts continue to struggle with how far this constitutional right should extend within our public school system.<sup>3</sup> This concern presents even more difficulty for courts, and similarly, school administrators, where the speech occurs off-campus<sup>4</sup> and is subsequently brought on-campus by a student other than the original speaker. In this situation, a court must

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<sup>1</sup> See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). This right was incorporated under the Fourteenth Amendment to protect against possible impairment of free speech rights by the states. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>2</sup> See *infra* note 5 and accompanying text.

<sup>3</sup> See Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 54-59 (1996) (discussing the extent of constitutional rights within schools); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 625-26 (2002).

<sup>4</sup> This includes speech that is made after school hours and not on school property.

determine when a student's First Amendment right to engage in off-campus private speech should yield to the school's interest in disciplining the student for such speech.

The courts have provided little guidance on how to deal with this situation, despite the fact that in recent years there has been an abundance of cases regarding students and their First Amendment rights with respect to off-campus speech.<sup>5</sup> In turn, there is a plethora of scholarly literature regarding a student's First Amendment rights to free speech.<sup>6</sup> There is, however, little scholarly discussion about off-campus speech that is brought on campus or to the attention of school authorities by another student that results in the speaker's expulsion or suspension. This issue is likely to become more important as students continue to use technology to communicate.<sup>7</sup>

The four courts that have approached this issue have treaded lightly, due to little precedent and little agreement regarding just how far First Amendment protection should

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<sup>5</sup> See generally *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (student suspended for unfurling a drug-endorsing banner at an off-campus, school-sponsored event); *Latour v. Riverside Beaver Sch. Dist.*, No. Civ. A. 05-1076, 2005 WL 2106562 (W.D. Pa. Aug. 24, 2005) (student suspended and expelled for rap songs written and recorded in his home); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002) (student suspended for website likely created at home); *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000) (student suspended for website created at home); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) (student expelled for website created at home).

<sup>6</sup> See generally David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 MICH. ST. L. REV. 199 (2000) (discussing off-campus speech and school administrators' fears about the Internet's effect on students); Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727 (2007) (discussing the "First Amendment parameters of student cyberspeech."); Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213 (2003) (discussing bullying and off-campus speech).

<sup>7</sup> Many of the off-campus student speech cases discussed in this Note concern the Internet. This is not surprising, considering that 71.1% of the population of North America uses the Internet. MINI WATTS MKTG. GROUP, INTERNET USAGE STATISTICS (2007), <http://www.internetworldstats.com/stats.htm>. Thus, such off-campus issues are likely to arise with increasing frequency in response to the widespread use of this medium.

Another possibility is that the courts will eventually entertain a lawsuit regarding text messaging. Texting involves sending a message in textual form, usually by a cellular phone or other similar device. Because of its increasing popularity among school-age children, it is yet another medium by which one could foresee future litigation regarding students' First Amendment rights.

extend.<sup>8</sup> The line delineating fully protected off-campus speech from the less protected on-campus speech becomes especially unclear when the off-campus speech is subsequently brought on-campus without the knowledge or permission of the speaker.<sup>9</sup> This distinction between on and off-campus speech is essential because it is often the threshold question in determining the applicable standard.<sup>10</sup>

If the speech is made on-campus, it usually fits into one of the three common categories: speech that is excessively lewd and vulgar; school-sponsored speech; or other speech such as political, religious, or moral opinions and statements. If a school considers the speech to be excessively lewd and vulgar, it may prohibit that speech.<sup>11</sup> Likewise, if the speech arises in the context of a school-sponsored activity, the school is justified in "exercising editorial control . . . so long as [its] actions are reasonably related to legitimate pedagogical concerns."<sup>12</sup> In other on-campus situations, a school may prohibit a student's speech only if it has reason to believe the speech will "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others."<sup>13</sup>

By contrast, when speech originates off-campus and is brought on-campus by a student other than the original speaker, the analysis is more difficult. Two courts have applied the "material and substantial" disruption test<sup>14</sup> in order to determine if the student's rights were violated, but have lacked uniformity

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<sup>8</sup> See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619–20 (5th Cir. 2004); *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 627 (8th Cir. 2002) (Heaney, J., dissenting) (arguing it was protected speech and that the court should have considered the fact that the speech took place off-campus); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001); *see also infra* Part II.

<sup>9</sup> See *Porter*, 393 F.3d at 619; Richard Salgado, Comment, *Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment*, 2005 BYU L. REV. 1371, 1374 (2005).

<sup>10</sup> See *Bethlehem*, 807 A.2d at 864–65.

<sup>11</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>12</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>13</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>14</sup> See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008) (using *Tinker* to analyze an Instant Message transmission which occurred off-campus); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) ("The overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*.").

in their application of that test. Another court held that because the speech was off-campus it was fully protected, thus ignoring the fact that it actually reached campus.<sup>15</sup> One other court analyzed the speech as a "true threat," while the dissent argued that a "substantial and material" disruption test should have been the appropriate analysis.<sup>16</sup>

This Note will address these apparent inconsistencies and recommend a solution for courts when analyzing such free speech cases. Part I of this Note discusses the history of First Amendment student speech jurisprudence. Part II provides an in-depth analysis of the four cases that concern off-campus speech brought on-campus by third parties. Part III compares student speech with public employee speech and asserts that an applicable standard can be developed by comparing these two areas of law. This Note concludes by recommending that a balancing test be applied much like that utilized in public employee First Amendment claims, and advocating its use when a student's private conversation is brought on campus by another student.

## I. THE EVOLUTION OF STUDENT SPEECH CASE LAW

### A. Foundational Cases Regarding On-Campus Speech

#### 1. The "Substantial and Material" Disruption Test

*Tinker v. Des Moines Independent Community School District*<sup>17</sup> is often at the heart of any discussion regarding a student's right to freedom of speech.<sup>18</sup> In *Tinker*, several students decided to wear black armbands to school in opposition to the war in Vietnam.<sup>19</sup> When school authorities became aware of this plan, they adopted a policy that any student wearing an armband would be told to remove it, and if he or she refused, that

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<sup>15</sup> See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619–20 (5th Cir. 2004) (discussing other courts' use of the substantial disruption test, but choosing not to apply it because the speech originated off-campus).

<sup>16</sup> *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 621–22, 627 (8th Cir. 2002). A "true threat" is where the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual." *Virginia v. Black*, 538 U.S. 343, 359 (2003); see also *infra* Part III.D.

<sup>17</sup> 393 U.S. 503 (1969).

<sup>18</sup> See *Miller*, *supra* note 3, at 628.

<sup>19</sup> See *Tinker*, 393 U.S. at 504.

student would be suspended until returning without one.<sup>20</sup> Consequently, several students sued the school after they were suspended for wearing an armband on campus.<sup>21</sup> As Justice Fortas stated, “[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>22</sup> The Court held that the school violated the First Amendment rights of its students when it failed to demonstrate that it “had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>23</sup>

The Court in *Tinker* also discussed the prohibition of viewpoint discrimination, stating that “school officials cannot suppress ‘expressions of feelings with which they do not wish to contend.’”<sup>24</sup> A school administrator cannot prohibit expression of a particular opinion unless it can show “something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>25</sup> Hence, political speech and other such potentially controversial speech are protected by *Tinker*.

## 2. Speech That Is “Obscene,” “Vulgar,” “Lewd,” and “Offensively Lewd”

Nearly twenty years later, the Supreme Court decided *Bethel School District No. 403 v. Fraser*.<sup>26</sup> In *Bethel*, the Court held that a school was justified in punishing a student who gave a speech that referred to a candidate for school office in terms of an

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 506. This statement is quite popular and is often quoted in cases and writings. See, e.g., *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 468 (6th Cir. 2000); *Barber ex rel. Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 852 (E.D. Mich. 2003); Dupre, *supra* note 3, at 54.

<sup>23</sup> *Tinker*, 393 U.S. at 509. Throughout this Note, this test is referred to interchangeably as the *Tinker* analysis or the “substantial and material disruption” test.

<sup>24</sup> *Id.* at 511 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” *Id.* at 512 (emphasis added) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>25</sup> *Id.* at 509.

<sup>26</sup> 478 U.S. 675 (1986).

"elaborate, graphic, and explicit sexual metaphor."<sup>27</sup> Matthew Fraser ("Fraser") gave his speech at an assembly where many students were required to attend. The Court labeled Fraser's remarks as "vulgar," "indecent," "sexually explicit," and "offensively lewd."<sup>28</sup> The Court reasoned, "[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school."<sup>29</sup> Further stressing the point, the Court opined that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."<sup>30</sup> The Court concluded that a school may prohibit speech that is vulgar, lewd, and offensive.<sup>31</sup>

With this holding, the Court effectively narrowed a student's right to free speech in the school setting. After *Tinker* and *Bethel*, there was a shift toward increasing school authority and lessening judicial interference.<sup>32</sup> The *Bethel* Court impacted the authority of school officials by allowing them to decide what type of speech is permissible for students in public schools. The end result was the return of some authority to school officials in deciding what type of speech is permissible by students in public schools.<sup>33</sup> Through *Bethel*, the Court effectively shifted the focus of student expression from the rights of the students to the needs of the educators and administrators, and showed an almost total judicial deference to the schools to pursue a safe and educational

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<sup>27</sup> *Id.* at 678. Fraser gave the following speech:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

*Id.* at 687 (Blackmun, J., concurring).

<sup>28</sup> *Id.* at 685 (majority opinion).

<sup>29</sup> *Id.* at 682.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 685.

<sup>32</sup> See Miller, *supra* note 3, at 637–40 (noting the shift in favor of school authority regarding students' rights after *Tinker*).

<sup>33</sup> *Id.*

environment.<sup>34</sup> The Court continued this trend in *Hazelwood School District v. Kuhlmeier*.<sup>35</sup>

### 3. Legitimate Pedagogical Need

In *Hazelwood School District v. Kuhlmeier*,<sup>36</sup> the Court addressed a case in which the school principal deleted two pages from a school newspaper that he believed violated the privacy of several students.<sup>37</sup> One article profiled pregnant students, and the other profiled children of divorced parents.<sup>38</sup> The Court permitted the principal's deletion, holding that if the speech at issue is "school-sponsored" a school may censor the speech "so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>39</sup> Thus, the Court granted school authorities the power to curtail and even censure speech that is part of the school curriculum. "This includes authority 'over school-sponsored publications, theatrical productions, and other expressive activities . . . reasonably perceive[d] to bear the imprimatur of the school.'"<sup>40</sup> In order to reach this conclusion, "[t]he Court reasoned that there is a fundamental distinction between school officials' toleration of student speech and school officials' affirmative promotion of student speech."<sup>41</sup> Included in this latter category is speech that is part of the school curriculum.<sup>42</sup>

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<sup>34</sup> See Dupre, *supra* note 3, at 83–86 (stating that the Supreme Court's decisions in *Fraser* and *Hazelwood* indicate a return of authority to school officials in regulating student expression in the school setting); Miller, *supra* note 3, at 636–37 (arguing that *Fraser* and *Hazelwood* can be seen as "the beginning of the end" for public school students free speech because in both cases the Court focused on school's power and ability to regulate student speech).

<sup>35</sup> 484 U.S. 260 (1988).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 262–64. The principal, after reading the page proofs, believed there was no time to make changes to the stories, and decided to publish the newspaper without them, deleting the two pages that contained the offending stories. *Id.* at 263–64.

<sup>38</sup> *Id.* at 263.

<sup>39</sup> *Id.* at 273.

<sup>40</sup> Martin A. Schwartz, *Supreme Court Restricts Student Speech*, N.Y. L.J., Oct. 16, 2007, at 3 (quoting *Hazelwood*, 484 U.S. at 270–71).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*



#### 4. The Need to Prohibit Illegal Drug Use

More recently, in *Morse v. Frederick*,<sup>43</sup> the Court held that a school was justified in confiscating a banner in which a student proclaimed, "BONG HiTS 4 JESUS."<sup>44</sup> The student holding the banner was attending an off-campus, school-sponsored event in January 2002, as the Olympic Torch Relay passed through Juneau, Alaska.<sup>45</sup> The school principal had allowed students to leave class in order to observe the event as "as an approved social event or class trip."<sup>46</sup> Frederick strategically unfurled the controversial banner just as the camera crews passed him by.<sup>47</sup>

The Court opined that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."<sup>48</sup> This case potentially opens the door for school administrators to further restrict the First Amendment rights of students.

This case differs from the trilogy of earlier cases in that it involves off-campus speech. The Court, however, treated the event as school-sponsored, making it still suitable to on-campus classification. Nonetheless, *Morse* illustrates the blurred line between on-campus and off-campus speech.

#### B. Off-Campus Speech

The extent of a student's First Amendment rights regarding off-campus speech is still developing, and a consistent pattern has not yet materialized. This is likely due to multiple factors: first, few such school cases have been litigated; second, although the seminal Supreme Court cases regarding student speech provide the courts with time-tested standards available to them if the speech is on-campus, they provide little direct guidance on how to analyze an off-campus situation.<sup>49</sup>

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<sup>43</sup> 127 S. Ct. 2618 (2007). For a blog entry discussing *Morse*, see Mitchell H. Rubinstein, *Supreme Court Rejects First Amendment Defense of Student Who Displayed Banner Promoting Illegal Drug Use*, ADJUNCT LAW PROF BLOG, June 25, 2007, <http://lawprofessors.typepad.com/adjunctprofs/2007/06/supreme-court-h.html>.

<sup>44</sup> *Morse*, 127 S. Ct. at 2622.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *infra* Part I.A. The only exception is in *Bethel School District Number 403 v. Fraser*, where Justice Brennan, in his concurring opinion states, "[i]f respondent had given the same speech outside of the school environment, he could not have been

Some courts have simply analyzed off-campus speech cases by declining to differentiate between student speech occurring on or off-campus. In doing so, they have applied the *Tinker* “material and substantive” disruption standard when analyzing off-campus speech brought onto the school campus.<sup>50</sup> Other courts, however, have found that even if the off-campus speech makes its way on-campus, it is entitled to full First Amendment protection.<sup>51</sup> Yet another court combined the approaches, analyzing off-campus speech “under a flurry of standards . . . to comprehensively address all possible legal approaches.”<sup>52</sup>

The confusion caused by these inconsistencies multiplies where the speech reaches campus through another student. In such cases, the student-speaker is even farther removed from the school setting.

## II. OFF-CAMPUS SPEECH BROUGHT ON-CAMPUS BY THIRD PARTIES

Given that the pure off-campus speech law is in disarray, it is not surprising that a consistent pattern is lacking with respect to off-campus speech brought on-campus by another student.

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penalized simply because government officials considered his language to be inappropriate.” 478 U.S. 675, 688 (1986) (Brennan, J., concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

<sup>50</sup> *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004); see, e.g., *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (applying *Tinker* to a website created off-campus); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (applying *Tinker* to a website created off-campus); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (applying *Tinker* to a student who compiled a list while off-campus); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying *Tinker* to mock obituary website created off-campus); CHARLES J. RUSSO & RALPH D. MAWDSLEY, *EDUCATION LAW* § 4.07[7] (2007 ed.) (stating that students may engage in indecent or malicious off-campus speech if “it does not actually cause school disruption”).

<sup>51</sup> *Porter*, 393 F.3d at 619 & n.43 (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (“[B]ecause school officials ventured out . . . into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.”)).

<sup>52</sup> *Id.* at 619 & n.44 (citing *Mahaffey*, 236 F. Supp. 2d at 783–86 (analyzing a website created off-campus under *Tinker* and the true threat analysis while citing to *Thomas* for the proposition that school officials have diminished authority regarding student off-campus expression)). The court opined that commentators are frustrated at these inconsistencies and “have begun calling for courts to more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation.” *Id.* at 619–20.

These cases involve student speech that occurred outside of school grounds and after school hours. The speech was later brought to the attention of school authorities by another student, and the student-speaker was ultimately disciplined. Although the specific underlying facts differ between the cases, they all have a common thread—the student neither intended nor desired his speech to reach school grounds.

In two of the following cases, the deciding court relied on the *Tinker* “substantial and material disruption” test.<sup>53</sup> These two courts varied in their application of the test, however, according different weight to the factors used to determine whether there was a substantial or material disruption. Another court declined to use the *Tinker* test because the speech occurred off-campus. Instead, it analyzed the issue by using generally applicable First Amendment standards, and held that the speech was protected.<sup>54</sup> In a fourth case, the court applied a “true threat” analysis, holding that the speech was a threat and therefore wholly unprotected. The dissent’s argument that the court should have considered the off-campus nature of the speech is particularly well-reasoned and relevant, however.<sup>55</sup> The lack of a clear guideline, even for those supposedly using a similar standard, produces unfairness and a lack of uniformity across jurisdictions.

#### A. *Wisniewski v. Board of Education*

Recently, in *Wisniewski v. Board of Education*,<sup>56</sup> the Second Circuit granted summary judgment in favor of the school district, holding that a school was justified in expelling a student who engaged in off-campus private speech.<sup>57</sup> Wisniewski shared with friends, via an Instant Message, a small drawing crudely suggesting that a certain teacher should be shot and killed.<sup>58</sup>

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<sup>53</sup> *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008); *Killion*, 136 F. Supp. 2d at 455.

<sup>54</sup> *See Porter*, 393 F.3d at 620.

<sup>55</sup> *See Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 636 (8th Cir. 2002).

<sup>56</sup> 494 F.3d 34.

<sup>57</sup> *Id.* at 35; *see also* Mitchell H. Rubinstein, *Icon Depicting Shooting of Teacher Not Protected Speech as It Was Foreseeable to Cause School Disruption*, ADJUNCT LAW PROF BLOG, July 12, 2007, <http://lawprofessors.typepad.com/adjunctprofs/2007/07/icon-depicting-.html> (commenting on *Pulaski*).

<sup>58</sup> Instant messaging allows a person with Internet access to exchange messages in real time with members of a group who have similar software on their computers. Members of this group are usually called “buddies” and are said to belong to a

Wisniewski did not send this message from school grounds, but instead from his parents' home computer.<sup>59</sup> Another student, upon becoming aware of the Instant Message icon, alerted the named teacher to the existence of the picture and eventually showed him a copy of it.<sup>60</sup> In holding that the school was justified in punishing Wisniewski, the court reasoned there was a reasonably foreseeable risk that Wisniewski's drawing would come to the attention of school authorities and ultimately would materially and substantially disrupt work and discipline at the school.<sup>61</sup> The court felt it was irrelevant that Wisniewski created and transmitted the Instant Message away from school property, and reasoned that it is possible to cause disruption even when outside school grounds.<sup>62</sup> Yet, in so holding, it ignored the fact that there was no evidence indicating that Wisniewski intended to disrupt school activities, or that he desired the speech to actually reach campus.

### B. *Killion v. Franklin Regional School District*

In *Killion v. Franklin Regional School District*,<sup>63</sup> high-school student Zachariah Paul and his mother brought an action against the school alleging violations of his First Amendment rights. The school suspended Paul for writing a list of insults<sup>64</sup>

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"buddy list." Instant message enables rapid exchanges of text between any two members of a "buddy list" that are online at the same time. Such speech is not available for the public to view, but instead may only be viewed by the member or members of the "buddy list" to whom the speaker is addressing. *Wisniewski*, 494 F.3d at 35.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 36.

<sup>61</sup> *Id.* at 38–39.

<sup>62</sup> *Id.* at 39 (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) ("We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.")).

<sup>63</sup> 136 F. Supp. 2d 446 (W.D. Pa. 2001).

<sup>64</sup> The court provided the text of the list:

- 10) The School Store doesn't sell twink[i]es.
- 9) He is constantly tripping over his own chins.
- 8) The girls at the 900#'s keep hanging up on him.
- 7) For him, becoming Franklin's "Athletic Director" was considered "moving up in the world".
- 6) He has to use a pencil to type and make phone calls because his fingers are unable to hit only one key at a time.
- 5) As stated in previous list, he's just not getting any.
- 4) He is no longer allowed in any "All You Can Eat" restaurants.
- 3) He has constant flashbacks of when he was in high school and the

about the school's athletic director, which he composed at home and after school hours.<sup>65</sup> An unknown third party subsequently brought the writing to school and placed it in the teacher's lounge, where it was later discovered by several individuals.<sup>66</sup> The court held that the student's document did not disrupt school or interfere with other students' substantial rights, and granted summary judgment for the plaintiffs.<sup>67</sup>

In reaching this conclusion, the court adopted the *Tinker* standard. The court held that the student's speech did not disrupt school or interfere with anyone's substantive rights, and it could not "ignore the fact that the relevant speech . . . occurred within the confines of Paul's home, far removed from any school premises or facilities."<sup>68</sup> It reasoned that the speech was not threatening, and although it upset the named teacher, there was no evidence that other teachers were incapable of teaching or controlling their classes.<sup>69</sup> In fact, Paul did not print the list or bring it on school premises; he only e-mailed the list to some friends.<sup>70</sup> Several weeks passed before the list appeared in the teacher's lounge at the Franklin Regional High School, and the list was on campus for several days before the administration even became aware of it and took action.<sup>71</sup>

### C. *Porter v. Ascension Parish School Board*

In *Porter v. Ascension Parish School Board*,<sup>72</sup> a school punished a student for a private expression which was brought on-campus by a third party. Adam Porter brought an action against his high school principal and other administrators alleging a violation of his First Amendment rights after he was removed from school for a sketch of a violent siege of the school

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athletes used to pick on him, instead of him picking on the athletes.

2) Because of his extensive gut factor, the "man" hasn't seen his own penis in over a decade.

1) Even it is [sic] wasn't for his gut, it would still take a magnifying glass and extensive searching to find it.

*Id.* at 448 n.1.

<sup>65</sup> *Id.* at 448.

<sup>66</sup> *Id.* at 448-49.

<sup>67</sup> *See id.* at 455.

<sup>68</sup> *Id.* at 457.

<sup>69</sup> *See id.* at 455.

<sup>70</sup> *See id.* at 457.

<sup>71</sup> *Id.* at 448-49.

<sup>72</sup> 393 F.3d 608 (5th Cir. 2004).

that he had drawn two years prior.<sup>73</sup> The court held that the sketch was protected speech.<sup>74</sup> Ironically, the court nonetheless granted summary judgment in favor of the principal, dismissing the First Amendment claim, declaring that the principal had qualified immunity because the existing law failed to provide clear guidance on the constitutionality of his actions.<sup>75</sup>

Like the students in *Wisniewski* and *Killion*, Porter was disciplined for off-campus speech. In the privacy of his own home, Porter had sketched a crude drawing of his school, East Ascension High School.<sup>76</sup> The drawing depicted the school under attack from a gasoline tanker truck, a missile launcher, helicopter, and armed persons.<sup>77</sup> "The sketch also contained obscenities and racial epithets."<sup>78</sup> Porter showed the sketch to his mother, his younger brother, and a friend who was living with the family, and then stored the sketchpad in a closet.<sup>79</sup> Two years later, Porter's younger brother, Andrew Breen, went searching for something to draw on and found the notebook.<sup>80</sup> Breen drew a llama on a blank page and brought it to school to show his teacher.<sup>81</sup> On the way home from school, he showed his picture to a friend.<sup>82</sup> The friend, while flipping through the notebook, saw Porter's picture, and alerted the bus driver, who then showed the drawing to the school principal.<sup>83</sup> Shortly thereafter, Porter was recommended for expulsion and arrested

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<sup>73</sup> Porter also alleged violations of his Fourth Amendment and Due Process rights. *Id.* The court granted summary judgment in favor of the defendants for both allegations. *Id.*

<sup>74</sup> *Id.* at 620.

<sup>75</sup> *Id.* at 621. The court allowed the principal qualified immunity because it felt that a principal should not be punished in a situation where

a reasonable school official facing this question for the first time would find no 'pre-existing' body of law from which he could draw clear guidance and certain conclusions. Rather, a reasonable school official would encounter a body of case law sending inconsistent signals as to how far school authority to regulate student speech reaches beyond the confines of the campus.

*Id.* at 620. It further opined that punishing a principal in this situation would lead to intimidation, instead of fearless decision-making. *See id.* at 621.

<sup>76</sup> *Id.* at 611.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

for "terrorizing" the school.<sup>84</sup> The court held that the speech did not equate to on-campus speech.<sup>85</sup> It reasoned that the *Tinker* standard was inappropriate because the drawing was composed off-campus and remained off-campus for two years until it was taken to school by Porter's younger brother.<sup>86</sup> The court further reasoned that there was no evidence to prove that he directed his speech toward the school campus. Thus, it held that the speech was fully protected.<sup>87</sup>

*D. Doe v. Pulaski*

In *Doe v. Pulaski*,<sup>88</sup> a junior high student, J.M., drafted two letters to his former girlfriend, K.G., also a student, expressing a desire to assault and murder her.<sup>89</sup> J.M.'s mother filed this lawsuit on her son's behalf when he was expelled as a result of the letters.<sup>90</sup> J.M. did not deliver the letters to his ex-girlfriend, nor did he intend for her to see them.<sup>91</sup> Months after J.M. penned the letters, his best friend discovered them, stole one, and delivered it to K.G., which resulted in school authorities being notified of the threats.<sup>92</sup> The court held that the letters were "true threat[s]," that they were not entitled to First Amendment protection, and that the expulsion was reasonable.<sup>93</sup> In order to reach this decision, the Circuit Court opined that it was necessary to conclude that J.M. intended to communicate the letter and that a reasonable recipient would have viewed the letter as a threat.<sup>94</sup> It ultimately held that J.M. did, in fact, intend for the content of the letters to be communicated when he permitted his friend to read the letter.<sup>95</sup> Moreover, the court held that a reasonable person would perceive the letters as a threat because of the disturbing language used throughout the letter,

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<sup>84</sup> *Id.* at 612.

<sup>85</sup> *Id.* at 615.

<sup>86</sup> *Id.*

<sup>87</sup> *See id.* at 617-18.

<sup>88</sup> 306 F.3d 616 (8th Cir. 2002).

<sup>89</sup> *Id.* at 619.

<sup>90</sup> *Id.* at 620.

<sup>91</sup> *Id.* at 619-20.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 626-27.

<sup>94</sup> *Id.* at 624.

<sup>95</sup> *Id.* at 624-25.

and because of J.M.'s portrayal of himself as a "tough guy with a propensity for aggression."<sup>96</sup>

Although the majority decided the case using a "true threat" analysis, Judge McMillian, in his dissent, argued that the speech was protected because it was not a "true threat," and was made off-campus, in the privacy of J.M.'s home.<sup>97</sup> He questioned "whether the school had any legitimate authority over such a statement, made in the privacy of his home, not at school or during school hours . . . , which was stolen from his home by one of his friends, . . . and then turned over to school officials."<sup>98</sup> Judge McMillian implicitly recognized the necessity of distinguishing private off-campus speech from speech that occurs on school grounds, and the propriety of affording the former with greater First Amendment protection.

*E. Analysis of the Leading Cases Concerning Off-Campus Speech Brought on Campus by a Third Party*

In the preceding four cases, the courts grappled with the standard to apply to determine the extent of the student's rights. For example, the courts in *Killion* and *Wisniewski* considered whether the student's speech substantially and materially disrupted school activities. They differed, however, in the degree of weight afforded to external factors, such as where the speech was made, when it was made, and how the speech reached campus. The *Wisniewski* court stated that speech occurring off of school property is not necessarily insulated from school discipline.<sup>99</sup> Yet, in *Killion*, the court gave considerable weight to the fact that the speech occurred off-campus.<sup>100</sup>

In *Porter* the court grappled with whether it should apply the "substantial and material disruption" test, but decided against it. The court ultimately based its decision on the basic

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<sup>96</sup> *Id.* at 625–26.

<sup>97</sup> *Id.* at 636 (McMillian, J., dissenting). In addition to Judge McMillian, several other judges argued in the dissent that J.M.'s letter was protected speech that could only be "reasonably regulated by school administrators to prevent substantial disruption in the school setting." *Id.* at 627 (Heaney, J., dissenting).

<sup>98</sup> *Id.* at 636 (McMillian, J., dissenting).

<sup>99</sup> *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

<sup>100</sup> See *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 457 (W.D. Pa. 2001).



premise that "[p]rivate writings made and kept in one's home enjoy the protection of the First Amendment."<sup>101</sup>

Although the majority in the *Pulaski* court considered J.M.'s speech a "true threat," and thus considered his speech unprotected, Judge McMillian agreed with the other dissenters that a substantial and material disruption test should be applied.<sup>102</sup> He further argued that in making the determination of whether there was such a disruption, the fact that the student did not personally bring the letter on campus should be considered.<sup>103</sup> Thus, the dissent's standard is quite similar to the application of the substantial and material disruption test used in *Killion*, because of the emphasis on the fact that the speech occurred off-campus.

Thus, with respect to off-campus speech brought on campus by another student, we are left with several different standards. Because of these inconsistencies, a court, or even a school official, facing this dilemma cannot find pre-existing law from which it could "draw clear guidance and certain conclusions."<sup>104</sup> Accordingly, it is necessary to establish a clear standard that could be readily and easily applied in order to give such guidance. In order to accomplish this task, it is helpful to look to other areas of law.

### III. REACHING A SOLUTION: APPLYING PUBLIC EMPLOYEE SPEECH STANDARDS TO STUDENT SPEECH CASES

#### A. *Analogy to Public Employee Speech*

To establish a workable standard for protecting off-campus speech, courts should analogize to some of the standards applicable to public employee free speech. The public employee standard has already been applied to some extent within the school setting. In *Lowery v. Euverard*,<sup>105</sup> for example, the Sixth Circuit compared student athletes to government employees.<sup>106</sup>

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<sup>101</sup> *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617 (5th Cir. 2004).

<sup>102</sup> *See Pulaski*, 306 F.3d at 627 (McMillian, J., dissenting).

<sup>103</sup> *See id.*

<sup>104</sup> *Porter*, 393 F.3d at 620.

<sup>105</sup> 497 F.3d 584, (6th Cir. 2007).

<sup>106</sup> *Id.* at 596-97 ("Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have

The court discussed the distinction between programs that are voluntarily participated in, such as extracurricular activities, and those activities that are regulated as a matter of law, such as attending school.<sup>107</sup> The court reasoned that because of the voluntary nature of extracurricular activities, “greater restrictions on student athletes are analogous to the greater restrictions on government employees,” making the “legal principles from the government employment context . . . relevant” in the student athlete context.<sup>108</sup> There are several other similarities and distinctions between public employee speech and student speech. The first similarity is that a school is a creature of the government itself. Courts have held in student speech cases and public employee free speech cases that “a government entity has broader discretion to restrict speech.”<sup>109</sup> Likewise, courts have held that both school authorities and governmental employers must maintain some “control over their [students’ and] employees’ words and actions”<sup>110</sup> in order to operate efficiently. Further, the relationship between students and teachers is similar to the relationship between employees and supervisors. A student is under certain constraints during the school day, just as an employee is during the work day.

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reason to expect intrusions upon normal rights and privileges, including privacy.” (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995))). In *Lowery*, the four plaintiffs were student-members of the Jefferson County High School football team. *Id.* at 585. Defendant Euverard became the lead varsity coach in 2004. *Id.* During the 2005 season, many players became dissatisfied with Euverard as the coach. *Id.* In October of 2005, one plaintiff typed the following statement: “I hate Coach Euvarad [sic] and I don’t want to play for him.” *Id.* Two of the plaintiffs asked the other team members to sign the petition. *Id.* The plaintiffs intended to give the petition to the principal of the school. *Id.* Euverard learned of the petition shortly thereafter. *See id.* at 586. The plaintiffs were uncooperative when asked about the petition and were eventually told they could no longer play for the team. *See id.* The players who signed the petition, but apologized for doing so, were allowed to remain on the team. *Id.*

<sup>107</sup> *See id.* at 597 (“Restrictions that would be inappropriate for the student body at large may be appropriate in the context of voluntary athletic programs.”).

<sup>108</sup> *Id.* In contrast, in *Pinard v. Clatskanie School District 6J*, the Ninth Circuit reversed a ruling by the district court that analogized student athletes as public employees, and held that the “proper First Amendment framework for student speech cases is set forth in the Supreme Court’s decision in *Tinker* and its progeny.” 467 F.3d 755, 765 (9th Cir. 2006).

<sup>109</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006); *see also* *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (recognizing that the government’s interests as an employer in regulating the speech of its employees “differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general”).

<sup>110</sup> *Garcetti*, 126 S. Ct. at 1958.

There is a need for orderly decorum in order to get work and school work done. Thus, the student and the employee both have responsibilities, and rules and regulations they must follow.

Nonetheless, there are also some notable differences. The first difference is that a student is required to attend school everyday. An employee, on the other hand, voluntarily chooses to work as a public employee. This is a subtle difference, however, because most employees have to work to earn a living, and because once an employee chooses to work for the government, he or she must attend regularly, just as a student must regularly attend class.

A second difference is the age of those concerned. The students are at a younger, more impressionable age. Furthermore, they are more susceptible to peer pressure and are more affected by what their classmates are saying and doing. Hence, the protection and the shelter they need may differ from the protection adults require.

Nevertheless, it is submitted that the similarities outweigh the differences, and that the public employee speech cases provide a useful model for student speech cases. In order to further evaluate the possible application of public speech cases to student speech cases, it is first necessary to understand when speech is protected in the public employee First Amendment context.

### *B. Public Employee Speech*

The landmark case in the government employee First Amendment context is *Pickering v. Board of Education*.<sup>111</sup> In *Pickering*, the Court held that the school board was not justified in firing Marshall Pickering, a teacher.<sup>112</sup> Pickering sued the school board for violating his First Amendment rights when he was fired shortly after writing a letter to his local newspaper in connection with a proposed tax increase.<sup>113</sup> He criticized the way the Board of Education and the District Superintendent of Schools handled past proposals to raise revenue for the school district.<sup>114</sup> Pickering was dismissed after the Board determined that publication of the letter was "detrimental to the efficient

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<sup>111</sup> 391 U.S. 563 (1968).

<sup>112</sup> See *id.* at 574-75.

<sup>113</sup> See *id.* at 564-65.

<sup>114</sup> *Id.* at 564.

operation and administration of the schools of the district.’”<sup>115</sup> The Court opined: “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>116</sup> This has become known as the *Pickering* balancing test. In using this test, the Court concluded that “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.”<sup>117</sup>

The *Pickering* balancing test is only one part of public employee free speech jurisprudence. The other parts of public employee speech have no applicability to student speech, but are still useful in order to understand the bigger picture. Following *Pickering*, the Court further elaborated the public concern element in *Connick v. Myers*,<sup>118</sup> and elevated it to the level of a threshold question in public employee First Amendment cases. The Court held that a public employee’s limited First Amendment rights do not require the employer to tolerate action that he reasonably believes “would disrupt the office, undermine his authority, and destroy close working relationships.”<sup>119</sup> In *Connick*, Sheila Myers, an Assistant District Attorney, was notified of her impending transfer, and in response, she distributed a questionnaire to her colleagues.<sup>120</sup> Shortly thereafter, Myers was allegedly terminated for refusing to transfer.<sup>121</sup> The Court held that the questionnaire did not meet the “public concern” threshold, and so it never reached the *Pickering* balancing test.<sup>122</sup>

Although useful in the public employee context, the “public concern” element should not be used in student First Amendment

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 568; see also *Connick v. Myers*, 461 U.S. 138, 145 (1983) (explaining the requirement that the speech be a matter of “legitimate public concern” in order to be protected).

<sup>117</sup> *Pickering*, 391 U.S. at 573.

<sup>118</sup> 461 U.S. at 142–49.

<sup>119</sup> *Id.* at 154.

<sup>120</sup> See *id.* at 140–41.

<sup>121</sup> *Id.* at 141.

<sup>122</sup> *Id.* at 148.

speech cases. It is not practical because most, if not all, student speech relates to private concerns. Student speech is often restricted to private grievances against teachers, administrators, and fellow students.

Personal "[a]utonomy is one of the primary justifications underlying freedom of speech."<sup>123</sup> "When school officials are authorized only to punish speech" that occurs on-campus, "the student is free to" express himself off-campus and after school hours, so that society is not "deprived of the salutary effects of expression."<sup>124</sup> Using the public concern element would prove to be too constricting, censoring the majority of such student expression.

In regard to public employee law, there is one more element that should be discussed—whether the employee is speaking pursuant to his or her official duties. This element is a result of *Garcetti v. Ceballos*.<sup>125</sup> The Court held that an employee's speech is not protected when it is made "pursuant to [his] official duties," because in that situation "the employee[] [is] not speaking as [a] citizen[] for First Amendment purposes."<sup>126</sup> Richard Ceballos, a supervising deputy district attorney, was asked to review a case in which the defense counsel claimed that police had used an incorrect affidavit to obtain a critical search warrant.<sup>127</sup> After concluding his review, Ceballos found the affidavit did, in fact, make "serious misrepresentations."<sup>128</sup> He reported these discoveries to his supervisors and suggested dismissing the case.<sup>129</sup> Nonetheless, the prosecutors went forward with the case. Following his testimony at a hearing challenging the warrant, Ceballos was transferred. He then

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<sup>123</sup> See Jeffrey A. Shooman, Comment, *The Speech of Public Employees Outside the Workplace: Towards a New Framework*, 36 SETON HALL L. REV. 1341, 1360 (2006).

<sup>124</sup> *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979).

<sup>125</sup> 126 S. Ct. 1951, 1960 (2006).

<sup>126</sup> *Id.* The Court explained:

The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

*Id.*

<sup>127</sup> *Id.* at 1955.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1955–56.

alleged his employers retaliated against him and violated his First Amendment rights.<sup>130</sup> The Court, however, did not find a constitutional violation.

The holding from this case is also not applicable in student speech cases because a student speaking at home and after school hours is clearly not speaking in the role of being a student, except in the rare situation where he is speaking at a school-sponsored event. This Note is not attempting to cover that scenario.

*C. The Solution: Application of the Pickering Balancing Test to Situations Where Another Student Brings the Speech to Campus*

A solution that would benefit both the schools, by allowing them to maintain control and discipline in specified circumstances, and the students, by allowing them to express themselves freely in the majority of situations, would be the adoption of a uniform balancing test, similar to that provided in *Pickering*. The balancing test is particularly useful for situations when another student brings the speech to campus because they present such a discrete set of circumstances. Moreover, a balancing test is practical and is already used to some extent by courts in student free speech cases.<sup>131</sup> It is also helpful because instead of focusing solely on the actual or potential impact on the school, it forces the court to consider all the circumstances surrounding the speech. The balancing test, however, needs to be standardized to create the uniformity that courts are currently lacking. In addition, this will aid school administrators and judges in determining whether censorship and/or punishment is justified.

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<sup>130</sup> See *id.* at 1956.

<sup>131</sup> See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 614 (5th Cir. 2004) (explaining that the district court developed standards “specifically to balance the First Amendment rights of students with the special need of educators to maintain a safe and effective learning environment”); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007) (“[T]he Court must balance the freedom of expression of a student with the right and responsibility of a public school to maintain an environment conducive to learning.”); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 855 (Pa. 2002) (stating that “the high courts of both the United States and Pennsylvania have performed the delicate balancing” when considering student constitutional rights and “the school officials’ need to maintain . . . discipline”).

When applying the balancing test, the court must not consider the statement or expression "in a vacuum."<sup>132</sup> While there is no easy formula for weighing one party's interest against another's, there are certain factors that may guide courts in performing their analyses and reaching a fair conclusion.<sup>133</sup>

In determining whether the school district is justified in disciplining a student when his off-campus speech is brought on-campus, the court should consider the following pertinent factors: (1) the intent, if any, for the speech to reach campus; (2) the number of listeners; (3) the nexus between the student speech and school operations; (4) the level of disruption on the school's operations caused by the speech.<sup>134</sup>

The first factor considers the intent of the student at the time of transmission. If the child desires the speech to eventually reach campus, then punishment is more likely justified. Similarly, if the student expresses himself to a student he knows may be personally and intimately involved with the subject of the transmission, and therefore may be more likely to share it, or to a student who has brought such speech to campus in the past, then the student-speaker should be reasonably aware that his listener may bring the speech to campus. Often, however, the student may be only expressing himself to his close friends, or expressing his emotions privately by means of doodling in a book or writing in a journal. The student might have chosen to do this away from school grounds because he realized the impropriety of doing it during school hours. The fact that the student did not intend for his speech to be brought on-campus should be given weight as a mitigating factor.

The second important consideration is the number of listeners. The more people the student addresses, the more likely that the speech will reach the school and/or disrupt its operations. Consider a situation where a student writes a letter and puts it in his nightstand,<sup>135</sup> or draws pictures in a notebook

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<sup>132</sup> *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007) (quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

<sup>133</sup> *See id.* Some of these factors are a synthesis of employee and student First Amendment cases, while the others were developed to ensure a broad range of considerations. Each of these factors should be considered independently, and none should be considered dispositive.

<sup>134</sup> These factors do not come from any specific case.

<sup>135</sup> *See Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 619 (8th Cir. 2002) (holding that a school was justified in suspending a student who wrote a letter

and puts it in his closet.<sup>136</sup> There, it is much less probable that the speech will reach school or affect anyone. In considering a similar situation, the Circuit Court in *Porter* held that “[f]or such writings to lose their First Amendment protection, something more than their accidental and unintentional exposure to public scrutiny must take place.”<sup>137</sup> Conversely, if a student sends an e-mail to his distribution list, consisting of thirty students, there is a very high likelihood that one of his recipients will further spread the content. The greater the number of listeners, the less likely any exposure will be accidental and unintentional, and the more likely it is to reach campus by means of a third party. Therefore, the student should be aware in a situation with a high number of listeners that his speech is likely not to remain private, and is possibly going to reach school grounds. In weighing this factor, a court should consider both the number of listeners and the medium for transmission in order to reach a fair decision.

The next consideration requires some recognizable nexus between the student’s speech and the operation of the school.<sup>138</sup> In several off-campus student First Amendment cases the courts have already denied “the imposition of discipline by school authorities” if they “find an insufficient nexus to school.”<sup>139</sup> To

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to his ex-girlfriend and hid it in his drawer).

<sup>136</sup> See *Porter*, 393 F.3d at 611, 618 (holding that a school was not justified in suspending a student who drew a picture in a notebook while in the privacy of his own home).

<sup>137</sup> *Id.* at 617–18.

<sup>138</sup> Although differing slightly in application, whether there was a “sufficient nexus” between the private speech and any “adverse employment action by the employer” is occasionally an issue in public employee speech cases. *Huang v. Bd. of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990) (discussing a requirement for the employee to demonstrate a sufficient nexus between the protected speech and the adverse action). There must be some “but for” connection or adverse action is not permitted. *Id.* In order to prove such a nexus, it must first be proved that there was a nexus between the speech and the workplace, otherwise a “but for” connection between the speech and the punishment would be extremely attenuated.

<sup>139</sup> Ronald D. Wenkart, *Discipline of K-12 Students for Conduct Off School Grounds*, 210 EDUC. L. REP. 531, 538 (2006) (discussing that the conduct must somehow be related to school activity); see, e.g., *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (recognizing that the student activity took place almost exclusively after school hours and off-campus); *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 964, 970 (5th Cir. 1972) (holding that an underground newspaper that was distributed outside of the school led to no attributable disturbances at the school); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007) (“[I]n cases involving off-campus speech . . . the school must demonstrate an appropriate



establish this nexus, the school must show that the speech was specifically directed towards the school, or the school must be able to connect the off-campus speech with potential disruption at school.<sup>140</sup> If the gap in this causal link is too substantial, then there is not enough of a nexus for the school to justify its prohibition.<sup>141</sup> By holding a child responsible in a situation where that connection is lacking, there is a real danger that the student will be blamed for a disruption at school in which he took no part. For example, there is probably more of a nexus if the speech is concerning a teacher or administrator than if the student is talking about another student, whom he knows because of an after-school activity. In the latter situation, connection between the students only occurs off school grounds and after school hours. There is much less of a chance for this relationship to cause any disruption on school grounds. Another consideration here is when the speech is made in relation to school attendance. If the speech is uttered over summer vacation or over Easter break, there is arguably a much weaker nexus to the school than if the speech is uttered during the school year.

The final, and perhaps most difficult, consideration is the impact on the school itself.<sup>142</sup> This is when the court could conduct an analysis of whether there was a "substantial and material" disruption. In determining whether there was a sufficient disruption, the court should consider whether the statement impairs discipline by teachers and school administrators.<sup>143</sup> When properly satisfied, the "substantial disruption" provision can strike a fair balance between protecting a student's freedom of speech and allowing the school to make justifiable decisions regarding the appropriateness of a student's speech.<sup>144</sup> The standard requires the existence of facts that would "reasonably . . . [lead] school authorities to forecast

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nexus."); *Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555, 559, 564 (Iowa 1972) (holding that the mere riding in a car that a student knew contained beer does not have a sufficient nexus to the operation or discipline of the school).

<sup>140</sup> See *Layshock*, 496 F. Supp. 2d at 600.

<sup>141</sup> See *id.*

<sup>142</sup> This factor is a combination of the substantial and material disruption test and the *Pickering* balancing test. See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570-73 (1968)).

<sup>143</sup> See *id.*

<sup>144</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 513-14 (1969) (holding that a school may censure speech that causes a substantial and material disruption).

substantial disruption of or material interference with school activities.”<sup>145</sup> The only concession the court may allow for the school is that the disruption could be reasonably foreseeable, as opposed to having already occurred.<sup>146</sup> Whether it is reasonably foreseeable should be based on a “well-founded expectation of disruption,” such as past incidents that arose out of similar speech.<sup>147</sup> This concession is necessary because disruption is, in substance, “what school discipline is designed to prevent.”<sup>148</sup> It is important, however, to emphasize that “even reasonably forecast[ed] disruption is not *per se* justification for prior restraint or subsequent punishment.”<sup>149</sup> In other words, a school is not authorized to censure student speech based merely on the potential emotive impact that it may have on a listener.<sup>150</sup>

#### D. *Unprotected Speech*

There are certain times when a student’s speech should not be protected, regardless of where it originates or how it reached campus. Primarily, the First Amendment does not provide for the protection of “true threats.”<sup>151</sup> “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>152</sup>

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<sup>145</sup> *Id.* at 514.

<sup>146</sup> *See id.*

<sup>147</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001).

<sup>148</sup> *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 973 (5th Cir. 1972).

<sup>149</sup> *Id.* The Supreme Court also addressed this concern in *Tinker*:

[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

393 U.S. at 508–09 (citation omitted).

<sup>150</sup> *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007) (citing *Saxe*, 240 F.3d at 209).

<sup>151</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003); *see also* RUSSO, *supra* note 50, at § 4.07[8] (“If students utter a true threat, . . . the speech does not qualify for the protection of the First Amendment.” (internal quotation marks omitted)).

<sup>152</sup> *Black*, 538 U.S. at 359 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)). It is not necessary for the speaker to actually carry out the threat. *Id.* at

The underlying concern for safety is particularly relevant in courts today, especially in light of tragic events such as the shootings at Columbine<sup>153</sup> and Virginia Polytechnic Institute and State University.<sup>154</sup> The right of free speech is not guaranteed in several other contexts, including speech that incites others to imminent lawless action,<sup>155</sup> speech that consists of fighting words,<sup>156</sup> and, finally, certain kinds of defamatory speech.<sup>157</sup> When speech falls into any of the above categories, student speech analyses are inapplicable because the speech is nevertheless unprotected, even in a non-school context. It is more often true, however, that the student does have First Amendment rights, the extent of which may be determined by whether the speech originated on or off campus and how the speech reached school grounds.

### CONCLUSION

The right to speak one's mind and express ideas is a vital and essential component of American society, whether applied to an adult or a student. The Supreme Court has recognized that the burning of an American flag is constitutionally protected free

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359–60.

<sup>153</sup> *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983 (9th Cir. 2001) (“Given the knowledge the shootings at Columbine . . . have imparted about the potential for school violence . . . we must take care when evaluating a student’s First Amendment right of free expression against school officials’ need to provide a safe school environment not to overreact in favor of either.”). See generally *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (analyzing whether a letter written by a student was a “true threat”); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996) (analyzing whether a verbal statement made to a guidance counselor was a “true threat”); *Latour v. Riverside Beaver Sch. Dist.*, No. Civ. A. 05-1076, 2005 WL 2106562 (W.D. Pa. Aug. 24, 2005) (analyzing whether a rap song written by a student was a “true threat”).

<sup>154</sup> See Helen Kennedy, *Bullies Made School Hell for “Crucified” Va. Killer*, N.Y. DAILY NEWS, Apr. 20, 2007, at 19.

<sup>155</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[C]onstitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

<sup>156</sup> Fighting words, which are “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction[,]” are generally condemnable under the First Amendment. *Black*, 538 U.S. at 359 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)).

<sup>157</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 283 (1964) (allowing for damages for defamation of a public official if the statement was made with “actual malice”).

speech.<sup>158</sup> On any street corner people can openly and publicly criticize political and religious leaders, and people can debate in churches, synagogues, mosques, and through the media whether homosexuality is a sin, whether same-sex marriage should be constitutionally prohibited, or whether the war in Iraq should be continued.

Students have First Amendment rights to discuss these issues—though that right is a bit more circumscribed in a school setting. The school environment is a natural place where students can be expected to raise controversial issues. It is also natural to expect that such speech may be brought on campus by another student.

One should expect to see an increase in the frequency of these cases in the future because of the electronic communication explosion, and because of the ever-present concern of school violence. A uniform standard that balances all the circumstances surrounding the speech is a solid first step towards ensuring that student rights do not fall by the wayside.

To accomplish this objective, the test proposed in this Note requires a balancing of interests; a test that is largely influenced by public free speech cases. Pertinent considerations include: (1) whether the student intended the speech to reach campus; (2) whether the number of listeners was large or small; (3) whether a nexus existed between the speech and school operations; and (4) whether the speech disrupted school operations. It is also recognized, however, that certain speech—such as “true threats,” speech that incites others to imminent lawless action, “fighting words,” and some defamatory speech—is not protected, nor should it be in the future.

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<sup>158</sup> See *United States v. Eichman*, 496 U.S. 310, 318–19 (1990); *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

